IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

NORTHWEST AUTO COMPANY,
a Corporation,
Plaintiff in Error,
vs.
G. H. HARMON,
Defendant in Error.

No. 3075

Brief for Plaintiff In Error

KERR & McCORD,
Attorneys for Plaintiff In Error.

Filed this .....day of February, 1918.
FRANK D. MONCKTON, Clerk.
By ..... Deputy Clerk.

BROWN, DAVID & NEWMAN, 83 COLUMBIA ST.

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Brief for Plaintiff In Error

The plaintiff in error is a corporation, organized under the laws of the State of Oregon, and is the Northwest distributor for the manufacturers of the Reo automobiles.

On October 17th, 1914, it entered into a certain agreement in writing with the Harmon Motor Car Company of Seattle, Washington, for the sale of Reo automobiles within certain counties in the State of Washington, a copy of which contract is as follows:

Memorandum of Agreement, made in triplicate this 17th day of October, 1914, by and between The Northwest Auto Company, hereinafter called the Seller and Harmon Motor Car Co. of Seattle, Wash., hereinafter called the Dealer.

THAT IN CONSIDERATION of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. The Seller agrees to sell to the Dealer, and the Dealer agrees to buy from the Seller during the period covered by this agreement 100 Reo automobiles f. o. b., Lansing, Mich. Sight draft against bill of lading with exchange, unless otherwise agreed. Said automobiles are to be as described in the manufacturer's catalog, (excepting vehicles designed for public transportation and commercial wagons, the manufacturer reserving the right to market such cars independently hereof) for distribution within the following described territory:

Whatcom, Skagit, Snohomish, Kittitas, Clallam, Jefferson, Kitsap, Island and San Juan Counties and that part of King County lying north of Auburn in the State of Washington, and agrees to refer to the Dealer all inquiries received by them from parties residing in the above described territory.

2. As part of the consideration for the grant-

ing of the right aforesaid, the Dealer agrees to push the sales of said Reo automobiles to the best of their ability within the territory aforesaid, and also agrees not to sell in any territory other than that hereinbefore specified, and also agrees to refer all inquiries for said Motor Cars from outside of said territory upon their receipt, to the Seller. The sales of REO automobiles to residents outside of the dealer's own territory is a serious trespass upon the rights and earnings of other REO dealers and sub-dealers and tends to destroy the organization and business of the manufacturer and seller and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the manufacturer and seller in their business, as well as to the business of all other REO dealers and REO sub-dealers and for any and each violation of the same by the dealer, the dealer hereby agrees to pay to the seller the sum of two hundred and fifty dollars ($250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the seller or manufacturer or from any sums which the seller may owe for business done by the dealer. The seller may also cancel this contract for any such violation.

3. The Seller reserves the right to reapportion this territory at any time during the life of this contract, if in the opinion of the Seller the Dealer is not properly promoting the sale of REO cars in all or any part of the above described territory, but shall give at least ten days notice of such re-apportionment.

4. Each automobile will be sold by the Seller to the Dealer at a price of $1000.00 f. o. b. Portland, until Dec. 1st, 1914, when a discount of twenty-two and one-half per cent (22½%) will be allowed the Dealer on all cars sold. The Dealer shall report at

the end of each week to the Seller all names and addresses of parties purchasing cars from the Dealer during that week, together with the factory number of the car or cars sold.

5. All repair parts of the said REO automobiles will be invoiced by the Seller to the Dealer at the manufacturer's current list price, less a discount of 20 per cent. All bills for repair parts are due and payable on or before the 10th of the month following shipment. No exclusive territory given on parts.

6. The Dealer agrees to make no deduction from remittances for merchandise returned, until after the receipt from the Seller of a credit memorandum therefor. And it is further understood and agreed that all repair parts returned for credit, either to the factory or to the Seller shall be shipped CHARGES PREPAID.

7. The Dealer agrees to deposit with the Seller the sum of seven hundred and fifty ($750.00) dollars as a guarantee for the satisfactory performance of this agreement. Said deposit to be returned to him upon the termination of this contract, less any amount that may be then owing to the Seller for repair parts, accessories, or to cover commission on cars sold outside of the above described territory.

8. The Dealer agrees to accept delivery of the said REO automobiles according to the following schedule, and to furnish detailed specifications at least 30 days prior to date of delivery.

MODELS	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	July
Touring Cars .	..	..	2	1	4	8	20	20	20	15	10	..
.....	..	..	..	..	..	..	..	..	..	..	..	..
.....	..	..	..	..	..	..	..	..	..	..	..	..
.....	..	..	..	..	..	..	..	..	..	..	..	..
Roadsters	..	..	..	..	..	..	..	..	..	..	..	..
.....	..	..	..	..	..	..	..	..	..	..	..	..

In the event the Dealer fails to furnish to the Seller detailed specifications at least 30 days prior to the first of the month, during which shipment is to be made, the Seller may deduct such cars from the total allotment and dispose of them as he sees fit, or cancel this agreement at their election.

9. The Dealer hereby agrees to maintain at least one REO automobile for demonstrating purposes and to maintain a suitable salesroom and an efficient shop for the care of said REO automobiles.

10. This agreement is contingent upon delays due to strikes, floods, accidents, or any other causes beyond the control of the manufacturer or Seller, whether occurring in the plant of the manufacturer or in that of any concern from which the manufacturer or Seller purchases parts or equipment. And the shipment of the said REO automobiles covered by this contract is to be made as above specified, subject to the prior orders of other dealers, and as the business of the manufacturer will permit.

11. It is mutually understood and agreed that this contract shall terminate by limitation on July 31st, 1915. It is further understood that this contract supersedes all previous agreements for the sale of REO cars between the contracting parties and that it becomes effective from date of signature by the Seller and the Dealer.

12. It is understood that the place of performance of this agreement is (city) Seattle, (state) Wash.

In Witness Whereof we have hereto set our hands this 17th day of October, 1914.

THE NORTHWEST AUTO COMPANY,
(The Seller)
By F. W. VOGLER, Pres.
HARMON MOTOR CAR CO.,
(The Dealer)
By F. E. HARMON, Pres.

Witness.....

.....

The prices mentioned herein to remain in effect until Nov. 30th, 1914, when they are to be subject to revision providing the manufacturer's list or catalog price and selling price to the Seller is changed.

Portland, Oregon, Oct. 17th, 1914.

It is agreed and understood that the attached contract will only be made good and expire on July 31st, 1915, provided a certain note, amounting to Twenty-three hundred and ninety-four and 03-100 ($2394.03) dollars, falling due in thirty (30) days from today, is paid promptly on the due date and it is further agreed and understood that this Clause is

made part and parcel of the attached Contract, the same as if it had been written or printed therein.

HARMON MOTOR CAR CO.,
(Signed) F. E. HARMON, Pres.
NORTHWEST AUTO CO.,
(Signed) F. W. VOGLER, Pres.

WITNESSED:
C. LE FEBURE.

This contract is referred to in the record as "Plaintiff's Exhibit 3."

The Harmon Motor Car Company mentioned in said contract was supposed by the plaintiff in error, the Northwest Auto Company, to be a corporation, and the record shows that there had formerly been a corporation known as the McKenna-Harmon Company (48). Mr. McKenna afterwards retired and it was sought to change the name of the company to the Harmon Motor Car Company, and papers seem to have been prepared with that end in view; but such consummation seems never to have been brought about, owing to the fact that the papers were never legally filed. The business, however, of what had formerly been the McKenna-Harmon Company continued to be transacted under the name of the Harmon Motor Car Company.

As above stated, the plaintiff in error assumed,

in dealing with the Harmon Motor Car Company that it was a corporation, and that F. E. Harmon was the President and General Manager of the same and it was in full reliance upon F. E. Harmon individually having full control of the management and operation of said business that said contract was entered into. No negotiations were had with any person in connection with said contract other than F. E. Harmon. If the Harmon Motor Car Company was not a corporation under the facts as they existed, then the Harmon Motor Car Company was, so far as the plaintiff in error was concerned, merely the trade name of F. E. Harmon.

After the execution of said contract and the said F. E. Harmon, so trading as the Harmon Motor Car Company, had entered upon the performance of the same, and in the month of January, 1915, the plaintiff in error became advised that the said Harmon was drinking intoxicating liquors to excess and was neglecting the business of said Automobile Selling Agency, and was so conducting himself as would necessarily and eventually tend to bring the business of said agency and the standing of the Reo car into disrepute in the public mind in the City of Seattle and the ter-

ritory covered by said contract. About the first of February, 1916, the said Harmon was arrested and lodged in jail in the City of Seattle, charged with disorderly conduct and on February 2d, 1915, wired the President of the plaintiff in error, F. W. Vogler, as follows:

DEFENDANT'S EXHIBIT "B."
WESTERN UNION.
DAY LETTER.
1915, Feb. 2, P. M. 6.10.

Seattle, Wn. 1
F. W. VOGLER,
Northwest Auto or Residence,
Portland, Ore.

Will you come to Seattle tonight; am in serious trouble.

F. E. HARMON,
HARMON MOTOR CAR CO.

Upon the receipt of said telegram Mr. Vogler came to the City of Seattle, and there found said Harmon lodged in jail, charged with disorderly conduct. Mr. Vogler then visited Harmon's place of business and found the defendant in error in charge thereof, and then informed her that said contract would have to be terminated. Mr. Vogler also notified Mr. F. E. Harmon that, under the circumstances, the contract would have to be terminated (202-203). Some negotiations were apparently had with a view to defendant in error being permitted to conduct the business and to take over the contract on her own responsibility, and it seems that the

plaintiff in error would not have objected to this being done, provided the defendant in error could have made satisfactory financial arrangements to enable her to successfully carry out the provisions of the contract. Upon the trial, however, it developed that during the period above referred to, that is the early part of 1915, the Harmons had been having some domestic disagreements and that at the very time of the culmination of F. E. Harmon's troubles, as above recited, and as a result thereof, an assignment had been executed by him to his wife, the defendant in error herein, whereby he undertook to transfer and set over to her all his interest in the business, and everything connected with the business, which would, of course, include the contract with the plaintiff in error.

After spending several days in Seattle Mr. Vogler became convinced that suitable arrangements would not be made for the defendant in error to take over the contract and conduct the business and that said Harmon Motor Car Company was at said time practically insolvent financially and without any means whatsoever to engage in or conduct the business successfully, and that unless outside means could be obtained other arrangements

would have to be made for the representation of the Reo car in Seattle. Mr. Vogler thereupon returned to Portland and on February 22d, 1915, addressed to the Harmon Motor Car Company at Seattle, Washington, the following communication, being plaintiff's Exhibit 8.

NORTHWEST AUTO CO., INC.

Portland, Ore., Feb. 22n, 1915.

Registered.

Harmon Motor Car Company,
Seattle, Wash.

Gentlemen:

We herewith give you notice that we are obliged to cancel the contract covering the sale of REO cars and parts now existing between us. The factory advise that owing to the condition of affairs at present existing in Seattle, that for the best interests of all concerned, it is desirable that a change be made.

We will call your attention also to the clause attached to the contract regarding the payment of a certain note, which note has not been paid as agreed.

Under the circumstances, therefor, we will consider the contract cancelled ten days from today, as per clause No. 3 in same.

Yours very truly,

NORTHWEST AUTO COMPANY,

By W. J. H. CLARK,
Secy.

WJC E

On February 24th, 1915, Mr. Vogler received from the defendant in error a telegram as follows: (Defendant's Exhibit "A")

WESTERN UNION

DAY LETTER.

Feb. 24, 1915. PM 2 56

Rx Seattle, Wn. 24.
Mr. Fred Vogler,
Care Northwest Auto Co.,
Portland, Ore.

Am making arrangements with man of consideration means to go into parnership with me and put new money in the firm. Will change firm name and reorganize and carry on the business in a way that cant help but satisfy you. Do not make definite arrangements with anyone else until you hear my proposition. Can you come to Seattle? Rush answer.

GERTRUDE HARMON.

This last communication was not, however, answered, because arrangements had meanwhile been made by the plaintiff in error for other representation.

About the first of February, 1916, the following assignment of all rights of action arising out of the transactions above referred to, was executed to the defendant in error, being Plaintiff's Exhibit 2.

PLAINTIFF'S EXHIBIT "2"

For a valuable consideration, the undersigned hereby sell, assign, transfer and set over to G. M. Harmon, all their right, title and interest in and to any and all rights for damages, or cause or causes of action for damages arising out of that certain contract executed on the 17th day of October, 1914, by and between the Harmon Motor Car Company and the Northwest Auto Company, together with all their interest in and to any and all claims of whatsoever kind and nature which they have against the Northwest Auto Company.

Dated at Seattle, Washington, this 1st day of February, 1916.

McKENNA & HARMON,
By F. E. HARMON,
Its President.
HARMON MOTOR CAR CO.,
By F. E. HARMON,
Its President.
ATTEST: G. M. HARMON,
Its Secretary.

The defendant in error instituted suit against the plaintiff in error for the alleged wrongful cancellation of the contract, seeking to recover damages in the sum of $13,727.10, as the amount of prospective profits, which could have been secured by the defendant in error had said contract not been cancelled. Trial was had to a jury and resulted in a verdict in favor of the defendant in error in the sum of $13,727.10.

ASSIGNMENT OF ERRORS.

I.

The Court erred in permitting the witness Thornton to answer the following question:

"Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff's Exhibit 3, as follows: October, 2; November, 1; December, 4; January, 8; February, 20; March, 20; April, 20; May, 15; and June, 10; if, I say, deliveries of cars had been made according to that schedule, how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st day of July, 1915?"

The defendant objected to this question upon the ground that it called for a conclusion and the objection was overruled and defendant took exception. (330)

II.

The Court erred in refusing to sustain defendant's objection to permitting the witness F. E. Harmon to answer the following question:

"Q. Mr. Harmon, what, if anything, in addition to what you testified yesterday * * * what condition, if any, in addition to what you suggested yesterday afternoon created a demand and a special demand for autos in the city of Seattle in the year, later part of the year, 1914 and 15?"

The defendant objected to this question being answered upon the ground of its being immaterial, and the objection being overruled exceptions were taken.

III.

The Court erred in overruling the said witness'

answer to the question set out in assignment six, which answer was as follows:

"A. Well along with the other things I named yesterday, one thing in particular was the coming of jitney busses; that is the thing that brought out several hundred, a good hundred sales in the city of Seattle *along,* and the Reo car was a practical car for that because of its feature of being cheap in operation and such things as that and there were a good many Reos and such cars as that sold."

The defendant moved to strike this answer out upon the ground that it was immaterial and the motion was denied and exception taken.

IV.

The Court erred in refusing to grant the defendant's motion for nonsuit. To which ruling the defendant took exception and exception was allowed. (331)

V.

The Court erred in refusing to permit the witness Vogler to answer the following question, when he was being examined as to what was the outcome of his going to a certain bank to make inquiries as to the financial standing of the Harmon Motor Car Company:

"Q. What was the result?"

To this ruling defendant duly objected and excepted.

VI.

The Court erred in refusing to permit the witness Albert Burke to answer the following question:

"Q. Well, what representations, if any, were made to you with reference to this being a new car?"

The answer to this question would have been that the Harmon Motor Car Company had sold to this witness a second-hand car representing that it was a new car. Objection to the answer having been sustained, the defendant excepted.

VII.

The Court erred in striking the answer to the following question propounded to the witness Burke:

"Q. Why would you not have kept your contract with them?"

The plaintiff moved to strike this question because she contended that the contract did not provide for cancellation on such a contingency, the answer having been:

"A. Because the business relations weren't pleasant."

To this ruling defendant excepted.

VIII.

The Court erred in refusing to permit the witness Burke to answer the following question:

"Q. Well, what were the facts that caused you to cancel (332) this contract in addition to not having furnished you the cars?"

IX.

The Court erred in refusing to permit the witness Burke to continue his answer to the following question:

"Q. Now, if I may, go on and state any further instances * * *"

Mr. HALVERSTADT.—"We object to a general discourse to this answer."

The COURT.—"Yes, I must sustain the objection, because we are not trying out the issues between the Harmon Motor Car Company and this witness; that's a new issue entirely; that is not before the Court."

Mr. IVEY.—"I would like to except, your Honor."

The COURT.—"Noted."

It being the contention of the defendant that this evidence was material.

X.

The Court erred in granting plaintiff's motion to strike out the testimony of the witness Clark as to the conditions existing which prevented the defendant from getting sufficient cars to fill its contracts, which said testimony is set out at page 242 of defendant's proposed bill of exceptions; such testimony having been claimed by plaintiff to be self-serving and hearsay evidence. To this ruling the defendant excepted and exception allowed.

XI.

The Court erred in refusing to permit the defendant to prove that the contract that was had by said witness Burke and the Harmon Motor Car Company was cancelled by the said witness for a good and sufficient reason, which ruling this defendant excepted. (333)

XII.

The Court erred in refusing to give defendant's proposed instruction No. 1 as follows:

"You are instructed that the defendant Company had a right under the terms of the contract in

question to cancel and rescind the contract that it had with the Harmon Motor Car Company, if the defendant F. E. Harmon conducted the business of the Company in such manner as to bring the Reo machine into disrepute and if you find from the evidence in this case that the said conduct was such as to bring about this disrepute then your verdict must be for the defendant."

To which defendant duly excepted and exception allowed.

XIII.

The Court erred in refusing to give defendant's proposed instruction No. 2, as follows:

"You are instructed further that if you find that the Harmon Motor Car Company at any time between the first of October, 1914, and the 22d day of February, 1915, through F. E. Harmon, the husband of plaintiff in this case, was neglecting the business of selling Reo machines and that the said F. E. Harmon was conducting himself and the business of said agency so as to bring the Reo car into disrepute in the City of Seattle and the territory covered by said contract, the defendant had a right to cancel and rescind said contract, and your verdict must be for the defendant."

To which defendant duly excepted and exception was allowed.

XIV.

The Court erred in refusing to give defendant's proposed instruction No. 3 as follows:

"You are instructed further that the contract in question is one of a personal nature and that the same could not be assigned by the Harmon Motor Car Company without the consent and approval

of the Northwest Auto Company and that any attempted assignment on the part of the Harmon Motor Car Company without this consent is void and of no effect."

To which defendant duly excepted and exception was allowed.

XV.

The Court erred in refusing to give defendant's proposed Instruction No. 4, as follows: (334)

"You are further instructed that if the said Harmon Motor Car Company, up to the time that said contract was cancelled by the defendant Company, was not properly promoting the sale of said Reo cars in the territory allotted to it by the contract, the said defendant Company had a right to cancel the said contract, and if you find from the evidence that the Harmon Motor Car Company during this period was not in fact properly promoting the sale of these cars, in all or any part of the territory allotted to it, then your verdict must be for the defendant."

To which defendant duly excepted and exception allowed.

XVI.

The Court erred in refusing to give defendant's proposed instruction No. 5, as follows:

"You are further instructed that the defendant had a right to cancel said contract for the failure of the Harmon Motor Car Company to pay that certain note described in said contract toward the end thereof, which said note was payable by the terms of said contract within thirty days from and after October 17th, 1914, and if you find that the

said Harmon Motor Car Company neither paid the said note within the said period of thirty days, nor within such additional time as was given to it by the defendant Company within which to pay the same, that said contract was subject to cancellation at the option of the defendant company, and your verdict must be for the defendant."

To which defendant duly excepted and exception was allowed.

XVII.

The Court erred in refusing to give defendant's proposed instruction No. 6, as follows:

"You are further instructed that if you find that the defendant was not justified in cancelling the contract it had with the Harmon Motor Car Company, you are then to determine what damages, if any, the Harmon Motor Car Company suffered by reason of this cancellation and in determining these damages you must include only such damages as could have been reasonably contemplated by the defendant company when it terminated said contract, and you are instructed that the contract in question provides that the Harmon Motor Car Company should report at the end of each week to the seller all names and addresses of parties purchasing cars from the Harmon Motor Car Company during that week, together with the factory number of the car or cars sold, and that if any damages were sustained by the reason of such nondelivery of any such cars that were not thus reported prior to the date of cancellation of such contract, that such item of damages shall not be allowed; and in determing the damage that the said Harmon Motor Car Company sustained you will (335) have to consider not the gross profits that would have been made on the sale of

machines that the plaintiff claims were not delivered to this company, but only the net profits that would have been made."

To which the defendant duly excepted and exception was allowed.

XVIII.

The Court erred in refusing to give defendant's proposed instruction No. 7, as follows:

"You are further instructed that the contract between the defendant and the Harmon Motor Car Company provided, among other things, that it was contingent upon delays due to strikes and other matters and that the shipment of the automobiles which the defendant was to furnish to the said Motor Car Company was subject to the prior orders of other dealers and was to be made as the business of the manufacturer would permit, and if you find that the plaintiff was entitled to damages against the defendant, you are to use as a basis of the number of machines that should have been furnished, that number which you find could have been furnished by the defendant under said contract, having due regard for the said provisions, and you are instructed that the said defendant by said contract did not agree to cause the manufacturer to do anything in particular, but it agreed to furnish the Harmon Motor Car Company the number of machines referred to in said contract subject to the conditions, among others, just mentioned."

To which the defendant duly excepted and exception was allowed.

XVIII.

The Court erred when it gave the following instruction:

"The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earning already made and practically terminated. In other words, the defendant could not under the terms of this contract cancel the contract after the plaintiff had sold a number of automobiles and had earned the money by reason of the provisions of the terms of this contract, without compensationg the plaintiff for the earnings already made, etc."

To which the defendant duly excepted and exception was allowed. (336)

XIX.

The Court erred when it gave the following instruction:

"You are also instructed that the plaintiff would be entitled to recover for such sales as could have been made during the life of the contract, if the cars had been furnished, *it* you find from the evidence that it was reasonably certain that the sales could have been made and the profits could have been earned, but such profits from such sales must appear from the testimony to have been reasonably certain, etc."

To which the defendant duly excepted and exception was allowed.

XX.

The Court erred when it gave the following instruction:

"You are further instructed that the fact that this note attached to this contract provides that if the note was not paid within a given time that the contract should end, that under the testimony dis-

closed in this case, that provision of the note is waived * * * and the Harmon Motor Car Company or the plaintiff in this case as the successor in interest of the Harmon Motor Car Company would have been entitled to reasonable notice and demand for the payment and afforded an opportunity of meeting the terms before being cut off in an arbitrary way."

To which the defendant duly excepted and exception was allowed.

XXI.

The Court erred in instructing the jury as follows:

"You are instructed on terminating a relation existing between one party and another upon a given ground and for a stated reason, one may after the termination of that relation and suit has been instituted in the court to recover because of a wrongful termination of that relation, change his reason for terminating that relation. In other words, the defendant in this case could not terminate the contract in February for a stated reason, and now give another reason upon the trial of the cause for the cancellation of the contract. It is bound by the reason given in the letter at the time the contract was attempted to be cancelled, which is in evidence, because of any other reason, which may appear in the evidence may not be enforced."

To the giving of this instruction the defendant excepted and exception was allowed.

XXII.

The Court erred in not granting the defendant a new trial, to which defendant duly excepted and exception was allowed. (337)

XXIII.

The Court erred in making and entering the decree made and entered herein on or about the 1st day of September, 1917, because the verdict upon which the said decree was based was against the law, contrary thereto and excessive in amount, and because the jury, in arriving at their verdict, did not follow the instructions of the Court. The defendant excepted to the entering of this decree and the exception was allowed.

ARGUMENT.

It is only on the theory that the contract involved was an assignable contract and that the defendant in error could have compelled the plaintiff in error to proceed with the contract after its assignment by F. E. Harmon of all his rights under the same to her that she could be allowed to recover prospective profits.

This contract, as stated in the beginning was entered into because the plaintiff in error was satisfied at the time with the personal characteristics of Mr. F. E. Harmon and his ability to successfully carry out the contract. The contract involved the personality of F. E. Harmon himself, and such contracts are not assignable.

In *Arkansas Valley Smelting Co. vs. Belden*

Mining Co., 127 U. S. 379-387, Mr. Justice Gray said:

"At the present day, no doubt, an agreement to pay money or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him or by some other stipulation which manifests the intent of the parties that it shall not be assignable. But everyone has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent."

"In the familiar phrase of Lord Denman: 'You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' "

"Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such as the party whose agreeement conferred those rights must have intended to be exercised only by him in whom he actually confided."

Pollock on Contracts, 425.

"In *Lansden v. McCarthy* (1869) 45 Mo. 106, it was held that a written contract whereby one agreed to furnish a firm conducting a hotel with 'all the fresh beef, pork and mutton that might be ordered and required by the said Bedard & Knickerbocker or their agents for the use and consumption of said hotel for the year then next ensuing, at ten cents per pound, Bedard & Knickerbocker on their part agreeing to pay for the meat so furnish-

ed promptly at the end of each successive month during the continuance of said contract,' could not be enforced by one who had become the proprietor of the hotel and had taken an assignment of the meat contract. The court said: 'The plaintiffs' counsel admit the proposition that where an executory contract is founded upon trust and confidence reposed in the character and skill of a particular person—as, where an author contracts to write a book, or an artist contracts to paint a picture—the contract is not assignable by the party in whom such trust and confidence is reposed. The principle involved in this concession is fatal to the plaintiffs' case; for the defendant's estimate of the solvency and pecuniary credit and standing of the plaintiffs' assignors may have constituted an important inducement to the contract, without which he never would have entered into it. There was a credit given. The meat was not to be paid for on delivery, but at the end of the successive months, involving credit to an indefinite amount. The amount of meat to be furnished any given month was not optional with the defendant but was to be determined by the hotel proprietors in view of the wants and convenience of the hotel. The contract imposed no obligation upon the defendant to accept as his debtors any other parties than those with whom he contracted. Nor was he under any obligations to experiment for a month and determine at the end of it whether he would go on with the contract according as he should or should not succeed in securing prompt payment. He was willing to give Bedard & Knickerbocker credit; but it does not thence follow that he was willing to give credit to the plaintiffs, even for a month or any part of it. Whether or not he would do so was a question for him alone to determine. He could not be forced into it against

his will by an assignment of the contract without his consent."

"Since brewing beer is a matter of skill and experience a contract between a brewery company and one to whom it leased a hotel and saloon, whereby the lessee agreed to purchase all of the beer sold during the term of the lease from the lessor Company, cannot be enforced by one who purchases the assets of the brewery company from its trustee in bankruptcy." *Jetter v. Scollan,* (1905) 48 Misc. 546; 96 N. Y. Supp. 274, affirmed in 114 App. Div. 902, 100 N. Y. Supp. 1122.

"And where an ice company had been dismissed by a customer because of dissatisfaction with its service, subsequently bought out a company of which the customer was then taking and delivered ice to him for a year without notifying him of the change of companies until the ice was consumed, it was held that the customer was not liable for the ice so supplied." *Boston Ice Co. v. Potter* (1877) 123 Mass. 28, 25 Am. Rep. 9. The court said:

'There was no privity of contract established between the plaintiff and the defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell* (1870) 104 Mass 177, 6 Am. Rep. 216. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens Ice Company. Of this change he was entitled to be informed. A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract; as, when he

contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reason why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant before receiving the ice or before its delivery had received notice of the change and that the Citizens Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know.' "

In *Wheaton vs. Cadillac Automobile Company,* 106 N. W., 399, it is held that where a contract between a corporation and a partnership made the latter selling agent for the former, it being understood that one of the partners who was known to the corporation would use his personal efforts, a dissolution of the partnership authorized the corporation to abandon the contract, and the Court said:

"This is a suit brought by plaintiff for himself and as assignee of all the interest of his former partner, Stewart, in the business carried on by the copartnership known as the New Jersey Automobile Company, to recover for the alleged breach of a contract to sell and deliver to plaintiff 50 automobiles, for which plaintiff claims to have placed an order which was accepted by defendant. It is not disputed that there was a contract between the parties,

but counsel disagree radically as to its character. Counsel for plaintiff insist that the contract is evidenced by the correspondence between the parties exclusively, and that it was primarily an agreement for the purchase and sale of personal property. On the other hand, counsel for defendant contend that the contract is to be derived from the correspondence and talks of the parties, and that the agreement was primarily for a selling agency in the State of New Jersey, involving the personal relationship of the parties. The partnership was dissolved, and Mr. Stewart retired from the firm before any automobiles were furnished. Mr. Metzger, at the time the contract was entered into, was sales agent for defendant, was well acquainted with Mr. Stewart, of the New Jersey Automobile Company, and had confidence in him as a salesman of automobiles. Metzger testified that he relied upon these qualifications in entering into the contract: 'In proposing the arrangement, I certainly relied upon Mr. Stewart being in the capacity of the salesman in handling the business * * * I never knew Mr. Wheaton (before the agency was given). In fact, originally, I supposed we were dealing entirely with Mr. Stewart * * * I, of course, expected Mr. Stewart to sell the goods, to maintain the agency, and employ competent help to assist him.' The circuit judge held that the defendant's construction of the contract was correct, and that 'the order for the 50 automobiles—the acceptance, if there is an acceptance by the Cadillac Company—is predicated upon the consideration that Mr. Stewart would use his personal efforts at least as a partner in the New Jersey Automobile Company, during the balance of the season, in the procuration of orders, and if that is so, gentlemen of the jury, upon the dissolution of that firm, one of the elements of consideration which

moved to the Cadillac Automobile Company was thenceforth lacking.' For this, among other reasons, the circuit judge directed a verdict for the defendant. We are of the same opinion as the circuit judge. The main purpose of the parties, as disclosed by this record, was, we think, the establishing of a selling agency in the New Jersey territory. The sale and delivery of machines to the agency so established was incidental to this main purpose. The contract was an entire one and indivisible, and not, as contended by plaintiff's counsel, separable into two distinct contracts, one for the establishment of an agency, and the other for the purchase of machines. Manifestly, the defendant was entitled, under such a contract, to the personal services of Mr. Stewart; and, having lost them by the dissolution of the partnership, it was entitled to abandon the contract.''

If the contract were non-assignable certainly no claim for prospective profits could be maintained subsequent to the date of cancellation. The principal claim on the part of the defendant in error is for prospective profits. She claims that at the date of the cancellation 44 cars had already been sold, 41 to dealers in other counties and 3 individual sales in Seattle. (138-9)

Figuring the profit on these cars on the basis of the cost of the cars to the Harmon Motor Car Company at 22½ per cent discount from the list price of $1050.00, plus freight each car would cost the Motor Company $908.50. Figuring the freight and the

discount price which was allowed the various dealers would make a profit to the Harmon Motor Car Company of approximately $3,000 for the 44 cars which were actually sold, or something over $70.00 a car, including sales to agencies and individual sales. (138-9) Money was actually returned on only three cars sold individuals in Seattle. (120) Four cars were afterwards sold to an agency in Kittitas County by the successor of the Harmon Motor Car Company at a profit of $315.00 for the four cars. Nine cars had already been delivered under the contract which would leave 43 cars to make up the balance of the cars required by the contract and the jury in this case found that the prospective profits on those 43 cars was upward of $12,000.00, notwithstanding the profits on the 44 cars which had actually been agreed to be sold under contracts already executed amounted to approximately only $3000.00.

Our understanding is that prospective profits cannot be allowed unless they are within the contemplation of the parties at the time the contract was entered into, and that only such profits as arise directly and necessarily out of the contract and not such as are incidentally or collaterally connected with it. The contract in this case provides that a

suitable salesroom and an efficient shop for the cars of the Reo Automobiles should be maintained, but did not provide that an extensive garage or a shop larger than the purposes contemplated by the contract itself demanded should be mainained, and that in case such collateral undertakings should be interfered with that the plaintiff in error could be held in damages by reason thereof.

The Harmon Motor Car Company had agencies for several other cars besides the Reo. It sold the Lozier, Interstate and Grant (55). The Reos in the previous years' business done by the Harmon Motor Car Company constituted approximately but one-third of the total sales made. At the beginning of 1915 the Harmon shop was a big shop, employing eighteen or nineteen men. (61) In figuring the profits on these 43 cars it was necessary, in order to get the figures arrived at in the verdict of the jury, to assume that every single car would be sold at retail in the City of Seattle, and in figuring the cost of selling the cars F. E. Harmon himself testified that the cost would be about $6100.00 (177). He was then permitted to testify to a lot of items upon which this shop, employing eighteen or nineteen men, made a large profit and figured these profits

against the selling cost of the cars, or, in other words was permitted to reduce the selling cost of the cars by figuring the profits on the shop against the total selling cost, and he was thereby permitted to make a showing that the actual selling cost of the 43 cars would be but about $3000. In other words defendant in error was permitted to charge the plaintiff in error with an element of profit in her business which could not possibly have been within the contemplation of the parties in entering into the contract. By this means plaintiff in error is mulcted in damages for the loss of profits of a concern which it never contemplated having anything to do with.

Another thing: The contract provided that the territory might be reapportioned at any time during the life of the contract if in the opinion of the seller the dealer was not properly promoting the sale of the Reo cars in all or any portion of the territory described in said contract.

The jury doubtless assumed that every single car uncontracted for would have been sold at retail, and doubtless overlooked the fact that the plaintiff in error had an absolute right to reapportion the territory at any time it deemed the actions of the dealer in not properly promoting the sale of Reo

cars justified such reapportionment. Further than this: The contract covers Whatcom, Skagit, Snohomish, Kittitas, Clallam, Jefferson, Kitsap, Island and San Juan Counties, and that part of King County lying north of Auburn in the State of Washington. No agency contracts had as yet been set up in either Jefferson, Kitsap, Island or San Juan Counties, and it is but fair to assume that had the contract been permitted to run to the date of its fixed termination, viz: July 31st, 1915, that agency contracts would have been placed in those counties and a reasonable number of cars sold therein, which would have been placed at a profit to the dealer similar approximately to that obtained in the other counties, and the profit on the 45 cars placed with agencies in the counties of Whatcom, Skagit, Snohomish, Kittitas and Clallam, as disclosed by the contracts themselves amounted to but slightly over $2500.

Further, the contract provided that the shipment of the Reo Automobiles covered therein should be as the business of the manufacturer would permit. (See clause 10 of contract).

It was testified to, without contradiction, that not more than 45 or 50 cars could have been fur-

nished by the plaintiff in error subsequent to the termination of the contract had the contract not in fact been cancelled at that time. (246-7)

As has been shown, 44 of these cars were already contracted for at a profit fixed by the contracts themselves of approximately $3000. This would have left practically no cars to have been sold at retail. Of course this is assuming that the number stated which could have been furnished after the termination of the contract was in fact all of the cars that could have been obtained from the manufacturer.

It seems to us that so far as the defendant in error having a right to introduce testimony to the effect that every car would have been sold at retail and that she was therefore entitled to her profit on each car upon the basis is concerned is analogous to the decision of the Oregon Supreme Court in the case of *McGinniss, Admr., vs. Studebaker Corporation,* 146 Pac., 825; 75 Ore., 519. This was the case of an automobile broker employed to sell cars on commission, and upon his employment being wrongfully terminated sought to recover as damages the profits which he might have made. It was held that although he had actually secured a list of prospects

at the time his employment was terminated, this fact did not entitle him to recover as damages the profits which he might have made had he sold them, since his ability to make the sales was merely speculation.

In the case at bar one of the witnesses for the defendant in error was propounded the following interrogatory:

"Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff's Exhibit 3, as follows: October two, November one, December four, January eight, February twenty, March twenty, April twenty, May fifteen, June ten, if, I say, deliveries of cars had been made according to that schedule how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st day of July, 1915?" (128)

Over the objection of the plaintiff in error he was permitted to answer and answered in substance that at least one hundred and twenty-five cars could have been disposed of. The contract only covered one hundred cars and the question propounded to the witness and his answer thereto was, under the circumstances, extremely prejudicial to the rights of the plaintiff in error. The error of the court in permitting this question to be answered in the manner in which it was and in permitting the answer to

stand, should alone justify the granting of a new trial. The jury could very easily have been misled by the answer into believing that the defendant in error was entitled to base her claim for prospective profits on the assumed sale of the one hundred and twenty-five cars; whereas, as we have stated, the contract called for but one hundred cars altogether. Eighteen of the forty-four cars, which the defendant in error claimed had been sold at the time the contract was cancelled were under contract to the Burke Motor Car Company at Everett and covering the territory of Snohomish County. At the time of the cancellation of the contract, Burke had already determined to abandon his contract with the Harmon Motor Car Company and to refuse to take any more cars from it for the reason that the business relations with the said Company had become very unpleasant and the Harmon Motor Car Company had endeavored to sell Burke a second-hand machine, representing the same as new. This testimony was certainly competent under the issues and the rejection thereof was error. The error was prejudicial to the rights of the plaintiff in error, and because the jury were permitted to figure the cars contracted to the Burke Motor Car Company as

sales already consummated, and if the Burke Motor Car Company would have refused to carry out its contract, as the witness Burke offered to testify, the sales of cars already made by the Harmon Motor Car Company would have been reduced by eighteen.

The Knutsen Brothers contract for Whatcom County, embracing eight cars, was not in writing (66) and was therefore not an enforceable contract, and the jury should have been so instructed.

The Nicholson Auto Company contract for Kittitas County embracing four cars, was not in writing at the time of the cancellation of the contract and was therefore not enforceable and should not have been allowed to stand as a consummated sale of said cars.

It is evident on the face of the record that the jury arrived at its verdict without any intelligent calculation as to the probable prospective profits based on any competent evidence introduced in the case and simply gave the defendant in error all that was asked for, the prayer of the complaint being for $13,727.10 and the verdict of the jury being for exactly the same amount.

The defendant in error was apparently unable to support this verdict satisfactorily by any evi-

dence adduced in the case and voluntarily remitted therefrom the sum of $893.95. We are unable to figure out upon what basis defendant in error made this remission. It is clearly indicated thereby that the defendant in error herself realized that the verdict was by said amount too great, and should be taken by the court as a conclusive indication that the verdict of the jury was extremely excessive.

We respectfully submit that the contract herein was not assignable and that when F. E. Harmon undertook to assign his interest in the same to the defendant in error and retire from said business, the plaintiff in error thereupon became entitled to abandon the contract and to make other arrangements for the sale of its cars in the territory covered by said contract. That no prospective profits should have been allowed after the date of said cancellation. In any event prospective profits on sales not made should be confined to somewhere near the profits on sales actually made under similar conditions. In which case the damages herein would be reduced at least half. Because of the extreme excessiveness of the verdict, if for no other reason, the judgment should be reversed.

Respectfully submitted.

KERR & McCORD,

Attorneys for Plaintiff In Error.